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No. 84-1023

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Petitioner,

v.

FERNANDO ROJAS-CONTRERAS,
Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF OF THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether a defendant can be forced to trial on a superseding indictment in less than the thirty-day minimum defense preparation period guaranteed by 18 U.S.C. §3161(c)(2)?

2. Whether forcing a defendant to trial in violation of the specific and rigid mandate of Congress which guarantees a thirty-day minimum defense preparation period can ever be deemed harmless error?

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JUDGMENT BELOW

On May 23, 1983 the Respondent was sentenced to a term of imprisonment for one year and one day [R.T.S. 6; C.R. 17; DKT. 16].[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence.

Title 8, U.S.C. §1325 provides in pertinent part:

> Any alien who (1) enters the United States at any time or place other than as designated by immigration officers . . . shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than $500, or by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than $1,000, or both.

The Speedy Trial Act provides in pertinent part (18 U.S.C. §3161(c)(2)):

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first

---

[1] "R.T.S." refers to the Reporter's Transcript of the sentencing proceeding; "R.T.Tr." refers to the Reporter's Transcript of the arraignment and plea on the superseding indictment and the trial. "C.R." refers to the district court Clerk's Record filed in the court of appeals. "DKT." refers to the Docket Entries which reflect all filings in the case. The docket entries are contained in the last three pages of the Clerk's Record ("C.R." tab number "DKT").

appears through counsel or expressly waives counsel and elects to proceed pro se.

STATEMENT OF THE CASE

Arrest, Presentment, Indictment

On February 13, 1983 Respondent was arrested by agents of the United States Border Patrol. Agent William Burt arrived shortly after Respondent's apprehension and recognized him as someone he had arrested before. Respondent was taken to the Border Patrol station where he was interrogated by Border Patrol Agent Stark who was aware of Respondent's prior record of immigration law violations and his true identity [R.T.Tr. 156-162; 184-185; 261-264; 281-282]. The following day a complaint was filed charging Respondent with a violation of 8 U.S.C. §1325 (felony illegal entry) and 8 U.S.C. §1326 (reentry after deportation). The predicate conviction giving rise to the felony 1325 charge was alleged to be March 1, 1981 (copy attached as Appendix).[2] On February 18, 1983 the grand jury for the Southern District of California returned a two-count indictment charging Respondent with the two violations of the immigration laws to wit: felony illegal entry and reentry after deportation. Count one of the indictment, felony illegal entry, charged that Respondent knowingly and unlawfully entered the United States and that before said illegal entry had been convicted of the crime of illegal entry "on or about December 17, 1981" [C.R. 3].[3] The indictment was filed

[2] The charge of felony illegal entry in violation of 8 U.S.C. § 1325 requires the government to prove a valid prior conviction for illegal entry. *United States* v. *Arambula-Alvarado*, 677 F.2d 51 (9th Cir. 1982). *See infra* p. 24.

[3] Count one of the February 18, 1983 indictment is also set forth in Petitioner's Brief [hereinafter cited as Pet. Br.] at 5 n.1.

and the case assigned to a district court judge.[4] The grand jury recommended a bond in the amount of $3,000 [DKT. 3]. On the same date Respondent appeared with counsel for arraignment on the indictment and entered a not guilty plea as to both counts [DKT. 4]. On February 28, 1983 Respondent appeared before the assigned district court judge and a date of April 11, 1983 was set for hearing motions and trial setting. No motion was filed and on April 11, 1983 the case was set for trial on Tuesday, April 19, 1983 [DKT. 5-6].

Superseding Indictment

On Friday, April 15, four days before the previously scheduled trial date, the grand jury returned a superseding indictment charging Respondent with two violations of the immigration laws to wit: felony illegal entry and reentry after deportation [C.R. 8]. An order setting a corporate surety/cash bail in the amount of $3,000 as recommended by the grand jury was filed on the same date [DKT. 8]. Count one of the superseding indictment charged the February 13, 1983 felony illegal entry but changed the date for the predicate conviction from December 17, 1981 to December 7, 1981 [C.R. 3, 8].[5] The

[4] In the Southern District of California the clerk of the court makes a random assignment of a district court judge to each case when the indictment is filed. This random assignment is accomplished by the filing clerk drawing a sealed envelope, which contains the initials of a district court judge, from a box containing a designated percentage of cards for each of the judges. When either a superseding indictment or a "notice of related case" is filed, the judge originally assigned to the case is reassigned without benefit of the random selection procedure.

[5] The prosecutor referred to this change as a "typo error" [R.T.Tr. 15]. Without support or justification Petitioner [Pet. Br. at 5] asserts that defense counsel "did not deny he had been advised of the

first indictment was outstanding at the time the superseding indictment was filed and remained in existence until dismissed following Respondent's sentencing on May 23, 1983 [DKT. 16].

On Monday, April 18, 1983, one day before the trial date scheduled for the original indictment, Respondent was arraigned on the superseding indictment and entered a not guilty plea as to both counts S1 and S2 [R.T.Tr. 5-6; DKT. 9].[6] Immediately following arraignment, Respondent's counsel made a demand for the thirty-day prepara-

typographical error in the original indictment well in advance of the scheduled trial date." Petitioner ignores the fact that the prosecutor never asserted that counsel was notified of any error, the second indictment was not returned until the Friday before the Tuesday trial date and that no occasion arose for defense counsel to affirm or deny any notice of the error.

[6] Respondent was arraigned before the district court following the February 18, 1983 indictment. The arraignment was as follows:

> THE CLERK: Mr. Rojas, you are informed that a superceding indictment has now been filed charging you in one count with illegal entry, felony, and in count 2, to being a deported alien found in the United States.
>
> You are further advised you are entitled to have a trial by jury, to be represented by counsel at all stages of the proceedings before this court, and to have witnesses summoned to testify in your behalf.
>
> How do you plead to count 1 of the superceding indictment? Are you guilty or not guilty?
>
> THE DEFENDANT (through interpreter): No.
>
> THE COURT: Not guilty?
>
> THE DEFENDANT: Not guilty.
>
> THE CLERK: Not guilty. How do you plead to count 2 of the superceding indictment? Are you guilty or not guilty?
>
> THE DEFENDANT: No. Not guilty.
>
> . . . .
>
> THE COURT: Okay. This matter is set for trial tomorrow.

[R.T.Tr. 5-6] The docket entires refer to the superseding indictment counts as S1 and S2 and the counts on the first indictment as 1 and 2.

tion period provided for under the Speedy Trial Act and the Ninth Circuit's decision in *United States* v. *Arkus*.[7] Respondent's counsel informed the court that "there is a slight difficulty because with [sic] the superceding indictment" and made the demand for the thirty-day period provided under the statute and the case law.[8]

In addition to reliance upon the thirty-day defense preparation period and *United States* v. *Arkus*, defense counsel informed the court that neither the "A" file[9] nor the report of the fingerprint expert had been made available. Defense counsel informed the court that certain discovery in the case had just been made available, by way of a telephone conversation with the prosecutor, the previous Thursday and Friday [R.T.Tr. 10-12].

The prosecutor informed the court that while the "A" file would not be available until the afternoon of April 18, 1983, discovery provided on March 21, 1983 reflected the December 7, 1981 prior conviction [R.T.Tr. 15]. Respondent was not provided with a copy of his statement until

[7] 675 F.2d 245 (9th Cir. 1982).

[8] Contrary to Petitioner's assertion [Pet. Br. at 5 n.3], the record does not reflect that defense counsel was unaware of the decision in *United States* v. *Arkus* before the prosecutor called attention to it. The record reflects that defense counsel stated "as counsel for the government knows, I've already apprised him, and I think the court is aware of the Arcus (phonetic) decision of the Ninth Circuit, A-R-C-U-S [sic]. I have a copy if the court would need to be refreshed with it." [R.T.Tr. 6]

[9] The "A" file is a comprehensive file maintained by the Immigration and Naturalization Service which contains information regarding any and all immigration service contacts with the alien including reports of prior convictions and deportations [R.T.Tr. 10, 21]. The trial court apparently initially believed that the "A" file contained only deportation records until defense counsel corrected the misapprehension [R.T.Tr. 21].

March 31, 1983 [R.T.Tr. 17].[10] The government took the position that the Respondent had not been prejudiced in any way and that defense counsel had "access" to the dates of the convictions and "certainly an opportunity" to prepare [R.T.Tr. 18]. When the court wanted to hear further about the "A" file, the prosecutor stated that if the court had a "problem" with the fact defense counsel had not seen the file the government had no objection to dismissing count two.[11] Count S2 was dismissed by the court as a condition of the denial of the motion to continue [R.T.Tr. 23, DKT. 9].

Defense counsel's concern that necessary reports relating to prior similar acts would be found in the "A" file was countered by the prosecutor's *submission* that "any reports in the 'A' file would be no more than the reports provided to counsel" in connection with previous cases involving Respondent.[12] The court found it would be

[10] It is notable that according to Petitioner's calculations and theory of argument the defense preparation period guaranteed by 18 U.S.C. § 3161(c)(2) expired on March 20, 1983, one day before discovery was provided with respect to Respondent's December 7 prior conviction and eleven days before Respondent was provided with a copy of his statement [Pet. Cert. at 9].

[11] In the Ninth Circuit, a collateral attack on the legality of the deportation which forms the basis for the 8 U.S.C. § 1326 violation is permitted. *United States* v. *Gasca-Kraft*, 522 F.2d 149 (9th Cir. 1975); *United States* v. *Rangel-Gonzales*, 617 F.2d 529 (9th Cir. 1980). The prosecutor moved to dismiss rather than try to provide "adequate discovery in the eleventh hour before trial" stating that the dismissal motion was made "because the government cannot realize any additional time in custody in regards to count two" [R.T.Tr. 18]. *See United States* v. *Ortiz-Martinez*, 557 F.2d 214 (9th Cir. 1977) (cumulative punishments for single transaction violating both 8 U.S.C. § 1325 and 8 U.S.C. § 1326 prohibited).

[12] According to the prosecutor, in two cases Respondent had been

improper to start trial on S2 (8 U.S.C. §1326), the count identical to count two of the first indictment, without a review of the "A" file, but that in regard to the prior act problems raised by the proof of S1, it would be "speculative" that the deportation file contained more than the discovery provided to counsel. The court relied on the fact that "clearly on two and probably on three" occasions Federal Defenders represented Respondent [R.T.Tr. 26]. Defense counsel informed the court he only had some of the reports [R.T.Tr. 21].

With respect to the thirty-day defense preparation period of 18 U.S.C. §3161(c)(2), the prosecutor took the position that *United States* v. *Arkus* was distinguishable. The prosecutor argued that the defendant had not shown prejudice and that a superseding indictment was not even required because the indictment could have been amended [R.T.Tr. 18-20].[13] Finding that the first issue before the court was prejudice to the defendant by virtue of trial on the superseding indictment one day after

represented by other attorneys with Federal Defenders of San Diego two years earlier. The prosecutor spoke with "some reasonable certainty" that Respondent had been represented by Federal Defenders on the third case in 1981 also [R.T.Tr. 22]. The prosecutor imputed knowledge of and control over the discovery reports by virtue of this prior representation without any basis that such discovery had been provided in the earlier cases.

[13] The prosecutor relied upon *United States* v. *Dawson*, 516 F.2d 796 (9th Cir.), *cert. denied*, 423 U.S. 855 (1975), for this proposition. In *Dawson*, the Ninth Circuit affirmed one of the exceptions to *Ex parte Bain*, 121 U.S. 1 (1887), that "corrections of typographical errors or making changes that are 'merely a matter of form' are not constitutionally impermissible." *Id.* at 801. However, *Dawson* authorized the striking of surplusage whereas in Respondent's case the grand jury changed a date affecting the enhancement element of the offense. *See infra* p. 24.

arraignment, the trial court resolved that the change in count one was not significant and caused no significant problem [R.T.Tr. 24]. The court also found *Arkus* distinguishable [R.T.Tr. 25].

Trial

Trial began as ordered on the next day, April 19, 1983. Defense counsel stipulated to Respondent's identity and alienage on the date of his arrest [R.T.Tr. 59-69]. There was no stipulation that the December 7, 1981 prior conviction, used as a basis to form the felony charge in S1, was correct [R.T.Tr. 68]. During the discussions regarding the stipulations defense counsel expressed confusion over the nature of the charge and the precise prior conviction the government intended to use [R.T.Tr. 60]. The court stated "they're using the conviction from the September 20, 1981 arrest for illegal entry" but the prosecutor acknowledged the existence of two judgment and commitments on December 7, 1981 [R.T.Tr. 60-61].

Evidence at trial revealed that Respondent was arrested near the Otay Lake located four to five miles north of the United States-Mexico border. He was found with a group of other people who stated they were from Mexico. The physical appearance of the people, including Respondent, indicated a recent crossing from Mexico. Respondent was recognized from a prior arrest and ultimately admitted to entering the United States earlier on February 13, 1983 without inspection as well as his previous arrest for illegal entry [R.T.Tr. 160-220].

The jury was instructed that three essential elements were required to establish the offense: alienage at the time alleged in the indictment, knowing and unlawful entry on or about February 13, 1983, and a previous conviction for illegal entry in the United States District

Court for the Southern District of California [R.T.Tr. 321]. The jury was further instructed that if it was unable to unanimously agree on the felony charge it should consider whether Mr. Rojas was guilty of the lesser included offense of misdemeanor illegal entry [R.T.Tr. 322]. The jury was instructed that the two elements of misdemeanor illegal entry were: alienage and knowing and unlawful entry on or about February 13, 1983.[14]

Respondent was convicted by the jury on April 20, 1983 [R.T.Tr. 332]. On May 23, 1983 Respondent was sentenced to a term of imprisonment of one year and one day [R.T.S. 7; C.R. 17]. The Ninth Circuit Court of Appeals, in an unpublished memorandum decision, reversed Respondent's conviction relying upon its earlier decisions in *United States* v. *Harris*, 724 F.2d 1452 (9th Cir. 1984), and *United States* v. *Daly*, 716 F.2d 1499, 1506 (9th Cir. 1983). The court held that

> section 3161(c)(2) of the Speedy Trial Act guarantees that a defendant will not be forced to trial less than thirty days from the date on which the defendant first appears *on the indictment on which the defendant ultimately goes to trial.*

[Pet. Cert. at 1a-2a (emphasis added)]

The court found Rojas-Contreras was entitled to an additional defense preparation period after arraignment on the superseding indictment and that no prejudice need be shown [Pet. Cert. at 2a].

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[14] Thus, if the jury disagreed as to the third element of felony illegal entry—the previous conviction as charged in the indictment—it could acquit of the greater offense and convict of the lesser included offense of misdemeanor illegal entry. At the time, the maximum penalty for felony illegal entry was two years and/or a fine of $1,000 and for misdemeanor illegal entry six months and/or a fine of $500. 8 U.S.C. § 1325.

SUMMARY OF ARGUMENT

I.

The minimum mandatory defense preparation period, codified in 18 U.S.C. §3161(c)2), applies to all indictments. As a result a defendant cannot be forced to trial in less than thirty days from the first appearance through counsel on the indictment upon which trial ultimately commences.

In 1979 Congress amended the Speedy Trial Act and added the thirty-day minimum mandatory defense preparation period which is at issue in this case. The intent of Congress was to provide defendants with a minimal period of time to prepare "even in the simplest case" and to avoid having defendants forced to trial too quickly. After over four years of experience with the Speedy Trial Act, 18 U.S.C. §§3161, *et seq.*, Congress realized that criminal defendants were unduly burdened by certain provisions of the Act. As a result, it enacted the minimum defense preparation period of 3161(c)(2) in order to prevent the Speedy Trial Act from becoming the "Speedy Conviction Act." At the same time and separate and distinct from the preparation period contained in 3161(c)(2), Congress added an "ends of justice" exclusion which could be used to extend the seventy-day limit to trial (3161(h)(8)(B)(iv)) upon a determination by the court that a defendant in a noncomplex case needed additional time to prepare.

Two provisions of the Speedy Trial Act of 1974 which were untouched by the 1979 amendments respond to situations where an indictment is dismissed and a later indictment is filed charging either 1) "the same offense or an offense based on the same conduct or arising from the same criminal episode" (3161(d)(1)) or 2) "the same

offense or any offense required to be joined with that offense" (3161(h)(6)). However, neither section deals with superseding indictments or indictments filed while the original indictment is still pending. In fact, superseding indictments are neither defined nor discussed in the statutory scheme of the Speedy Trial Act or in the federal criminal code.

Title 18 U.S.C. §3161(d)(1) provides that the seventy-day speedy trial clock starts over after a successful defense motion to dismiss an indictment where the government refiles an indictment charging "the same offense or an offense based on the same conduct or arising from the same criminal episode." Title 18 U.S.C. §3161(h)(6) provides that the time between dismissal of the indictment by the government and refiling of "the same offense or any offense required to be joined with that offense" is excludable time tolling the seventy-day speedy trial clock. Neither of these sections control the situation where there is no gap between the two indictments or where the original indictment remains in existence until after resolution of the superseding indictment. Instead, the plain language of 3161(c)(1) controls in those circumstances. The plain language of the section requires that "[i]n *any* case in which a plea of not guilty is entered, the trial of a defendant charged in *an* . . . indictment . . . shall commence within seventy days from the filing date . . . [or the date the defendant appears before a judicial officer, whichever is last] . . ." (emphasis added).

Applying both 3161(c)(1) (seventy-day time limit) and (c)(2) (thirty-day mandatory defense preparation period) to all indictments, including superseding indictments, avoids the problem that the seventy-day time limit to trial could be violated if the superseding indictment was filed after the fortieth nonexcludable Speedy Trial Act day.

While there is a minimal opportunity for abuse by the government continually filing superseding indictments in order to avoid the Speedy Trial Act's outer time limits, application of Fed. R. Crim. P. 48(b) (dismissal for unnecessary delay in bringing a defendant to trial) would control any such potential for abuse. Such an application effectuates the purpose of 3161(c)(2) by relieving the defendant of the burden of convincing a court of the *need* for a minimal time to prepare.

The mandatory defense preparation period must also apply in situations where the government dismisses an indictment shortly before filing a subsequent or superseding indictment (and thus where 3161(h)(6) is applicable). To hold otherwise places complete control over a defendant's time to prepare either in the hands of the government or the court. Congress enacted 3161(c)(2) specifically to place control over a minimum preparation period in the hands of the defendant, not the government or the court. If the government chooses to dismiss and refile (and thereby activate the exclusion provisions of 3161(h)(6)) after the fortieth nonexcludable day, then it must logically bear the burden of obtaining an "ends of justice" exclusion to enable the defendant to assert the thirty-day minimum defense preparation period. The government, and not the defendant, must be accountable for its own failure to supersede or file subsequent charges in compliance with the time provisions of the Speedy Trial Act. An alternate, yet still consistent interpretation of the interaction of 3161(c)(2) and (h)(6), is that an "ends of justice" exclusion automatically excludes the minimum defense preparation period from the seventy-day clock upon the filing of a superseding indictment.

The filing of a superseding indictment may force a defendant into the position of needing time to reflect and

evaluate the impact of even what appears to be an insignificant change, addition or deletion in the indictment. In those situations where additional time is not required, the defendant will likely consent to trial in less than the thirty-day minimum preparation period. The fact that the government decides to seek a subsequent or superseding indictment in itself reflects some intended impact on the case. Although in Respondent's case the government suggested the superseding indictment merely corrected a "typo error," the change in dates took away the possibility of an acquittal on the felony charge, thereby putting the defendant in a position of reviewing the case for alternate defenses. The government determined that the superseding indictment was necessary or presumably it would not have taken valuable grand jury time to re-present the same case. By the same reasoning, there is necessarily an impact upon the defendant's case which causes a need to evaluate the superseding indictment and possibly either negotiate a disposition or even prepare another defense. Congress intended to grant the defendant the absolute right to assert a minimum mandatory defense preparation period without having to express prejudice or convince a court to exercise its discretion to grant the time to prepare.

To expect a defendant to prepare for trial based on all potential and not actual charges ignores the realities of representing a criminal defendant. Counsel can only reasonably prepare to meet specific charges and not all potential charges or problems raised by pre-trial discovery.

II.

The harmless error rule cannot apply to violations of the rigid statutory requirement of 18 U.S.C. §3161(c)(2) which guarantees a minimum defense preparation period.

Congress created a bright line rule which if subjected to an application of the harmless error rule would be null and void. There are certain errors, including violations of strict standards of Congress, that require automatic reversal because the impact of the error is impossible to determine. By providing for a precise thirty-day minimum mandatory defense preparation period which a defendant alone can assert or waive, Congress presumed that any violation would be harmful or prejudicial. To permit a case by case analysis of the harm resulting from a violation of this rigid thirty-day rule would allow the district courts and prosecutors to overcome the intent of Congress as well as the plain meaning of 3161(c)(2). There is no reason for a court to violate the thirty-day minimum period for there is no discretion involved in its interpretation or application.

ARGUMENT

I.

THE SPEEDY TRIAL ACT GUARANTEES THAT A DEFENDANT CANNOT BE FORCED TO TRIAL IN LESS THAN THIRTY DAYS FROM THE DATE THE DEFENDANT FIRST APPEARS THROUGH COUNSEL ON THE INDICTMENT ON WHICH TRIAL ULTIMATELY COMMENCES.

The History and Purpose of 18 U.S.C. §3161(c)(2)

Title 18 U.S.C. §3161(c)(2) was added to the Speedy Trial Act in July 1979 amidst the government's push to expand and reconfigure the time limits of the Act or in the alternative to delay the effective date of the sanction provisions of the Act.[15] Ultimately Congress delayed the

[15] *See The Speedy Trial Act Amendments of 1979: Hearings Before the Senate Comm. on the Judiciary on S. 961 and S. 1028*, 96th Cong., 1st Sess. 31, 49 (1979) [hereinafter cited as 1979 Senate

effective date of the sanction provisions one year (from July 1, 1979 to July 1, 1980) but rejected the request of the Department of Justice to enlarge the time from the filing of charges to trial from 60 to 120 days.[16]

The "defense preparation period," as 18 U.S.C. §3161(c)(2) has become known, was contained in the proposed amendments suggested by the Department of Justice as well as the Judicial Conference and provided that "[t]he trial of a defendant shall not commence less than thirty days from the date specified in paragraph (1) without the consent of the defendant."[17] According to the

Hearings] (statement of Assistant U.S. Attorney General Phillip B. Heyman); *id.* at 149 (letter of Benjamin R. Civiletti, Deputy Attorney General); *id.* at 728-29 (letter of Attorney General Griffin Bell); *id.* at 4-15 (S. 961 and S. 1028 as submitted Apr. 10, 1979 and Apr. 26, 1979, respectively); *Proposed Amendments to the Speedy Trial Act of 1974: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 2 (1979) [hereinafter cited as 1979 House Hearings]; R.L. Misner, *Speedy Trial—Federal and State Practice* 215 (1983).

[16] The 1979 amendments merged the indictment to arraignment (ten days) and arraignment to trial (sixty days) time periods contained in the 1974 Act (18 U.S.C. § 3161(c) (1974)) into one seventy-day period. *See* 18 U.S.C. 3161(c)(1) (1979). The amendments also added 3161(c)(2) (the defense preparation period), 3161(d)(2) (time for retrial after appeal), 3161(h)(8)(B)(iv) (ends of justice continuance in a noncomplex case for continuity of counsel and trial preparation), 3161(h)(9) (delay to obtain foreign evidence), and made certain other changes in the automatic exclusion provisions in 3161(h)(1).

[17] *See* S. 961, 96th Cong., 1st Sess., 125 Cong. Rec. 7951 (Apr. 10, 1979); S. 1028, 96th Cong., 1st Sess., 125 Cong. Rec. 8841 (Apr. 26, 1979). "[P]aragraph (1)" referred to the later date of the filing of the indictment or appearance before a judicial officer of the court in which the charge was pending. *Id.* The Department of Justice supported a thirty-day minimum time limit "after indictment or [the defendant's] appearance before an officer of the court. . . ." 1979 House

Department of Justice it was

> [i]n recognition of the special problems often faced by defense counsel . . . [that the Depatment requires] a minimum of thirty days for defense preparation. This insures the defendant of some minimum preparation time even in the simplest case.[18]

The language of subsection (c)(2) was changed before final passage to delete the reference to "paragraph (1)" and provide that the thirty-day defense preparation period would run "from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se."[19] This modification in the language provided for a more liberal construction of the start of the defense preparation period. Sen. Report 212, *supra* note 19, at 32. In recognizing that the "appears through counsel" language was similar to the comparable provision in the Department of Justice and Judicial Conference bills, the Senate Committee on the Judiciary found that

> [p]rohibiting trial less than thirty days after the defendant appears in a position to begin preparing his defense more fully protects basic due process rights. . . .

Guidelines promulgated by the Second Circuit Judicial Council are also part of the history of the 1979 Amend-

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Hearings, *supra* note 15, at 15 (testimony of Shirah Neiman, Deputy Chief of the Criminal Section, Southern District of New York United States Attorney's Office).

[18] 1979 Senate Hearings, *supra* note 15, at 51-53 (statement of Assistant U.S. Attorney General Phillip Heymann).

[19] S. Rep. No. 212, 96th Cong., 1st Sess. 1, 32 (1979) [hereinafter cited as Sen. Report 212]. The House concurred with the change. H.R. Rep. No. 390, 96th Cong., 1st Sess. 1 (1979).

ments to the Speedy Trial Act.[20] These Guidelines were discussed and applauded and indeed made a part of the record of the 1979 House and Senate Hearings and the Congressional Record.[21] However, the Petitioner misconstrues their meaning. For the better part of seven pages of its brief, Petitioner weaves an erroneous analysis of the Second Circuit Guidelines [Pet. Br. at 22, 24-30] and concludes that they "made clear" that a defendant is not automatically entitled to a new thirty-day period following the return of a superseding indictment. This is simply incorrect. The Second Circuit Guidelines *never* provided for any thirty-day preparation period to be mandatory or automatic, but merely contained a policy statement in the preamble recommending (not mandating) that a request for thirty days to prepare be liberally construed.[22] The

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[20] Second Circuit Judicial Council Speedy Trial Act Coordinating Comm., *Guidelines Under the Speedy Trial Act (Jan. 16, 1979), reprinted in The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 386-436 (1979) [hereinafter cited as Second Circuit Guidelines].

[21] 1979 Senate Hearings, *supra* note 15, at 386-436; 1979 House Hearings, *supra* note 15, at 306-353; 125 Cong. Rec. 15457 (June 19, 1979). At the same session a letter from Deputy Attorney General Benjamin Civiletti as well as the Comptroller General's report of May 2, 1979 entitled "The Speedy Trial Act—It's Impact on the Judicial System Still Unknown" were also made a part of the record. *Id.* at 15454-15455.

[22] The Second Circuit Guidelines provided in pertinent part: "[t]o insure the accomplishment of the goal of accommodating the interests of speedy disposition of the charges with reasonable requests by counsel for adjournments, whenever the time between arraignment and the scheduled trial date does not exceed thirty (30) days, the court shall (a) view a request for an adjournment of trial to a date beyond thirty (30) days, but within the sixty (60) day limit, liberally

allowance of a thirty-day defense preparation period was by no means mandatory as it currently is, absent consent of the defendant in writing, in section 3161(c)(2). It defies both logic and common sense to find that the Second Circuit Guidelines eliminated a right they never provided. Furthermore, the wording of section 3161(c)(2), as adopted, is not even remotely similar to the wording of the Second Circuit Guidelines.

Had Congress, after full consideration of the Second Circuit's guidelines, wished to fully adopt them and give the defense preparation period their meaning, it would have done so. Such intent cannot be imputed because the "short answer is that Congress did not write the statute that way." *United States* v. *Naftalin*, 441 U.S. 768 (1979). The Second Circuit Guidelines are simply not instructive in interpreting a mandatory preparation period they never imposed.

Petitioner also ignores that the policy statement contained in the preamble to the Second Circuit Guidelines presumably applied to the entire guidelines and was not intended to have selective application. Nowhere in the section regarding "subsequent charges," 1979 Senate Hearings, *supra* note 15, at 416-419, do the guidelines suggest that a request for thirty days from the filing of the subsequent charge should be considered any differently than a smiliar request on the original charge. The Second Circuit Guidelines just never made the thirty-day period

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and (b) where such a request is denied, set forth its reasons for finding that the denial of the adjournment does not interfere with the defendant's or government's choice of counsel, or the parties' ability to prepare for trial without undue pressure." 1979 Senate Hearings, *supra* note 15, at 392-393.

mandatory or automatic at *any* time, while Congress did so in section 3161(c)(2).

Statutory Interpretation of 3161(c)(2)

It is against this backdrop that the scope of the defense preparation period guaranteed by subsection 3161(c)(2) must be interpreted. While, according to Petitioner, "the statute speaks clearly," the courts of appeals have given inconsistent and inconclusive interpretations to it. Petitioner's statement that the holding of the court below has been rejected by every other court of appeals that has considered the issue [Pet. Br. at 9 & n.6] is not accurate.[23]

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[23] The Seventh Circuit's decision in *United States* v. *Feldman*, 761 F.2d 380, 389 (7th Cir. 1985), followed the decision of the Ninth Circuit in *United States* v. *Harris*, 724 F.2d 1452 (9th Cir. 1984), also finding an automatic application of 3161(c)(2) to a superseding indictment. However, *Feldman* may have been decided after Petitioner filed its brief. Also, while the Second Circuit in *United States* v. *Guzman*, 754 F.2d 482 (2d Cir.), *petition for cert. filed*, 53 U.S.L.W. 3759 (U.S. Apr. 9, 1985) (No. 84-1604), rejected an automatic reapplication of (c)(2) it found as to one of the counts a reasonable continuance should have been granted. Likewise the First Circuit in *United States* v. *Rush*, 738 F.2d 497 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 1355 (1985), found that (c)(2) did not apply to the superseding indictment in that case and that (c)(2) applies only where (c)(1) also applies "unless [it would] deprive a defendant of adequate opportunity to prepare his defense." Thus, the issue was not completely resolved in *Rush*. *United States* v. *Horton*, 676 F.2d 1165 (7th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983), did not hold contrary to the Ninth Circuit, at least according to the Seventh Circuit when it rendered its decision in *Feldman*. The opinion in *United States* v. *Todisco*, 667 F.2d 255 (2d Cir. 1981), *cert. denied*, 455 U.S. 906 (1982), did not set forth how much time lapsed between the superseding indictment and trial nor did it turn on any specific analysis of 3161(c)(2). The court simply found that the district court did not abuse its discretion in refusing to grant a continuance. Petitioner inappropriately cited the Fifth Circuit ruling in *United States* v. *Williford*, No. 83-1376, *cert. denied*, 105 S.

Compare United States v. *Feldman*, 761 F.2d 380, 389 (7th Cir. 1985) ("it was a violation of the Speedy Trial Act to try [the defendants] less than thirty days after the return of the superseding indictment"); *United States* v. *Harris*, 724 F.2d 1452, 1455 (9th Cir. 1984) ("we read section 3161(c)(2) as guaranteeing that the defendant is not forced to trial less than thirty days from the date on which the defendant first appears *on the indictment on which the defendant ultimately goes to trial*" (emphasis in original)); *United States* v. *Wooten*, 688 F.2d 941, 951 (4th Cir. 1982) ("section 3161(c)(2) simply [] guarantee[s] to the criminal defendant the right to a delay of at least thirty days between arraignment and trial *in any circumstances*" (emphasis added)); *United States* v. *Arkus*, 675 F.2d 245, 248 (9th Cir. 1982) ("Congress intended that the thirty-day period apply also in cases of reindictment"), *with United States* v. *Gallo*, No. 83-3288 (6th Cir. May 29, 1985) ("the appropriate period for preparation by defendants following a superseding indictment is governed by the discretion of the district court, and not the statutory thirty-day requirement"); *United States* v. *Guzman*, 754 F.2d 482, 486 (2d Cir.), *petition for cert. filed*, 53 U.S.L.W. 3759 (U.S. Apr. 9, 1985) (No. 84-1604) ("[w]hen a superseding indictment makes only insubstantial changes in an original indictment, so that a defendant has not been deprived of adequate time to prepare a defense, we hold that, consistent with 18 U.S.C. §3161(c)(2), a district

Ct. 270 (1984), in view of the fact that the decision is not reported and not controlling authority. The Sixth Circuit has ruled contrary to the Ninth and Seventh Circuits, but based its decision on *Horton* and *Todisco*. *United States* v. *Gallo*, No. 83-3288 (6th Cir. May 29, 1985). However, the court in *Gallo* found the failure to grant a continuance to prepare following the addition of a RICO count in a superseding indictment was an abuse of discretion and reversed the conviction on that count. *Gallo*, slip op. at 32-33.

court may exercise its discretion in proceeding to trial without further delay"); *United States* v. *Rush*, 738 F.2d 497, 511 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 1355 (1985) ("[w]e think it fully consistent with the congressional purpose of (c)(2) to apply the thirty-day limit on the same basis as the seventy-day limit in (c)(1), unless in a specific case this would deprive a defendant of adequate opportunity to prepare his defense"); *United States* v. *Horton*, 676 F.2d 1165, 1170 (7th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983) ("a fair implication of the statute is that reindictment for the same offense is permissible and that the time period begins to run with the first indictment").

Any ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, *Liparota* v. *United States*, 105 S. Ct. 2084 (1985); *Rewis* v. *United States*, 401 U.S. 808, 812 (1971); *Bell* v. *United States*, 349 U.S. 81, 83 (1955), unless the legislature has clearly spoken to the contrary. *United States* v. *Gradwell*, 243 U.S. 476 (1917). Given the stated purpose of the thirty-day minimum to trial defense preparation period as set forth above and the requirement of lenity, the language "from the date the defendant first appears through counsel" can have no other reasonable meaning than the date the defendant *first appears through counsel on the indictment upon which the defendant ultimately goes to trial.*[24] While Petitioner now rejects such an interpretation, the government has previously urged an even more liberal construction f[illegible] 3161(c)(2) when, of course, it was to the government's advantage. *See United States* v. *Richmond*,

[24] The "prime danger" of the Speedy Trial Act as expressed by one of its drafters "is not dismissal but forced trial." 1979 Senate Hearings, *supra* note 15, at 73 (testimony of Professor Daniel Freed). In addition, the Senate expressed concern that it had not become "The Speedy Conviction Act." Sen. Report 212, *supra* note 19, at 26.

735 F.2d 208, 213 (6th Cir. 1984) (government argued that the 3161(c)(2) time period ran again after substitution of counsel). In fact, as Petitioner acknowledges, it was the *government* that urged the Ninth Circuit to hold that the thirty-day period of 3161(c)(2) ran again from the date of reindictment. *United States* v. *Arkus*, 675 F.2d 245, 246 (9th Cir. 1982).[25] *Arkus* formed the basis for the decision in *United States* v. *Harris*, 724 F.2d 1452 (9th Cir. 1984), which the Ninth Circuit found controlled the decision in Respondent's case [Pet. Cert. at 2a].

Contrary to Petitioner's assertions, both Respondent and the court of appeals gave the word "first" as it modifies appearance through counsel its "ordinary . . . common meaning" [Pet. Br. at 13 (citing *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)]. However Petitioner should not "make 'a fortress out of a dictionary' [but] remember[] instead that 'statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.'" *United States* v. *Rabb*, 680 F.2d 294, 296 (3d Cir.), *cert. denied*, 459 U.S. 873 (1982) (quoting *Cabell* v. *Markham*, 148 F.2d 737, 739 (2d Cir.) (Hand, J.), *aff'd*, 326 U.S. 404 (1945)). If the words of 3161(c)(2) do not mean first appearance through counsel *on the indictment on which the defendant ultimately goes to trial*, then the statute fails to give the meaning clearly intended by its history which was to provide the defendant with a minimum mandatory trial preparation time. To say that a defendant may prepare for trial in a vacuum, that is, in the absence of precise charges, is to ignore the realities of representing an accused criminal defendant.

Practical Interpretation of 3161(c)(2)

Any change in a criminal charge can modify the theory of defense and require different preparation. A date

[25] Pet. Br. at 16 n.10.

change abrogates a planned alibi addressed to the originally charged date just as the deletion of an overt act vitiates a defense theory that the government failed to prove its case beyond a reasonable doubt. The vast majority of criminal cases do not have clear-cut single defenses but contain a variety of options demanding many judgment calls by counsel. A minor shift in the wording of an indictment causes a need to reflect, plan and possibly prepare an alternate defense. To compel a criminal defendant to reveal the nature of his/her defense in order to obtain a short time to absorb the effect of even a slightly changed indictment intrudes into the attorney-client relationship and the traditional work product privilege. It also impacts the Sixth Amendment guarantee of the effective assistance of counsel. Indeed, as Congress recognized, courts are often "loathe to grant 'ends of justice' continuances to permit adequate preparation time." Sen. Report 212, *supra* note 19, at 26. This rush to judgment encouraged by the outer time limits of the Speedy Trial Act was precisely the abuse Congress sought to avoid by enacting 3161(c)(2).

Respondent's case is a perfect example of the need for a subsequent defense preparation period upon the filing of a superseding indictment. The government viewed its superseding indictment as correcting a "typo" error and asserted that Rojas was not entitled to any additional preparation time. Accordingly the district court denied Rojas' request for a second defense preparation period. Petitioner argues that Rojas "has never suggested any reason why the superseding indictment . . . made more trial preparation time necessary" [Pet. Br. at 39] neglecting to acknowledge that Rojas requested a delay to obtain the "A" file which contained reports about the prior conviction [R.T.Tr. 21]. Petitioner also manages to ignore that the government must have viewed the incorrect date in the indictment as a problem significant enough to war-

rant taking precious grand jury time to re-present the case and obtain a second indictment. This step of a second presentation to the grand jury reflects either a change significant enough to also warrant a second defense preparation period or a serious waste of the grand jury. The government must have realized the greater potential for acquittal of the felony as originally charged. See note 14, *supra*.

Given the clear position adopted by the Ninth Circuit in *United States* v. *Arkus*, 675 F.2d 245 (9th Cir. 1982), there was no reason for Respondent to set forth reasons for assertion of an automatic and mandatory right under 3161(c)(2). *Id.* at 248. Second, to require a defendant to reveal the impact a change in the indictment has upon the defense is improper and places an unfair burden on the criminal defendant. A second indictment containing even a slight change requires the defendant to reconsider the steps taken to that point in the case. A narrow or legal defense may disappear with the changes, just as obviously occurred in Respondent's case. The charge of felony illegal entry in violation of 8 U.S.C. §1325 requires the government to prove a valid prior conviction for illegal entry. *United States* v. *Arambula-Alvarado*, 677 F.2d 51 (9th Cir. 1982). The prior conviction must meet constitutional standards. *United States* v. *Timmreck*, 441 U.S. 780 (1979); *Boykin* v. *Alabama*, 395 U.S. 238 (1969). Count one of the first indictment arguably charged an invalid prior conviction because it charged that a conviction occurred on December 17, 1981 when in fact there had been no conviction on that date. If the jury found that the prior conviction was not proven beyond a reasonable doubt, that is, with "proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs" [R.T.Tr. 314] it could have returned a lesser included offense ver-

dict of misdemeanor illegal entry. The impact of a felony versus misdemeanor conviction is significant—a six-month maximum sentence versus a two-year maximum sentence. 8 U.S.C. §1325. An obvious defense (and the likely reason for the government's superseding indictment) existed until the filing of the superseding indictment. Without the defense preparation period, Respondent had no time to rethink his position, negotiate a disposition or develop another strategy for trial.[26]

The appropriate interpretation of 3161(c)(2) requires automatic application of the defense preparation period of 3161(c)(2) upon the filing of a superseding indictment. Such an interpretation results in a rule which is simple to apply. It does not require that counsel violate any attorney-client or work product privilege or the Sixth Amendment right to counsel by revealing the theory or theories of defense. Further it does not require discretionary calls by the court which could result in continuous litigation and appeals. *E.g.*, *United States* v. *Guzman*, 754 F.2d 482 (2d Cir.), *petition for cert. filed*, 53 U.S.L.W. 3759 (U.S. Apr. 9, 1985) (No. 84-1604).

Petitioner's reliance on the failure of the statute to qualify the 3161(c)(2) thirty-day time period by including "post-superseding indictments" is nothing short of amazing. Indeed nowhere in the federal criminal code or Federal Rules of Criminal Procedure is the term "superseding indictment" even used. Specifically, neither of the other two statutory provisions contained in the Speedy Trial Act which Petitioner argues control this case,

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[26] Certainly the loss of a defense is a "conceivable basis" to find the superseding indictment impeded Respondent's ability to go immediately to trial [Pet. Br. at 45].

3161(d)(1) and (h)(6), refer to superseding indictments.[27] In those two subsections, Congress was concerned with the dismissal of charges and a subsequent filing of the same or similar charges, not with the use of superseding indictments. Superseding indictments appear to be a creature of the prosecution created to correct sloppy drafting practices[28] and do not represent a significant percentage of the federal criminal trial load.[29] In fact, in view of the small percentage of cases to be controlled by resolution of the question presented by this case, one questions the vigor with which Petitioner insists the criminal defendant is not entitled to again assert the miniscule man-

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[27] 18 U.S.C. § 3161(d)(1) and (h)(6) are reprinted in Petitioner's statutory appendix, Pet. Br. at 2a-4a.

[28] *Cf.* Misner, *District Court Compliance with the Speedy Trial Act of 1974: The Ninth Circuit Experience*, 1977 Ariz. St. L.J. n.140, *reprinted in* 1979 House Hearings, *supra* note 15, at 225 n.140.

[29] Information received from the Administrative Office of the United States Courts (Statistical Analysis and Reports Div., Admin. Office of the U.S. Courts; *1980-1984 Annual Report of the Director*) reveals that superseding indictments and informations resulting in a judge or jury trial for the past five years represent an approximate average of 1% of the total number of defendants indicted. The numbers are as follows:

Year Ending June 30,	1980	1981	1982	1983	1984
Total Number of Defendants Proceeding to Trial on Superseding Indictments or Felony Informations	394	348	437	561	502
Total Number of Defendants Indicted	25,612	27,367	29,384	31,742	33,781
% Superseding Indictments/Felony Informations to Total Defendants Indicted	2%	1%	1%	2%	1%

datory preparation time provided by Congress in enacting 3161(c)(2).

Petitioner's reliance on the language "appears with counsel" as having a meaning significantly distinct from language linking the start of the defense preparation period to the date of indictment [Pet. Br. at 14] ignores the apparent rationale behind the modification of the language of 3161(c)(2) from that initially drafted. *See supra* pp. 15-16; Sen. Report 212, *supra* note 19, at 32. A criminal defendant is not in a realistic position to prepare a defense or even meet the government's case until counsel has entered the picture and the indictment has been received. The slightest modification of a charge, whether or not it is "material" in the eyes of the government or the court, may substantially change the defense. *See supra* pp. 22-25. Thus, the appearance of counsel in the absence of the specific charges upon which the trial will proceed is meaningless because it does not place the defendant in a position to prepare his defense.[30]

18 U.S.C. §3161(d)(1), (h)(6) and (h)(8)(B)(iv) are not Applicable to this Case

Petitioner relies upon the statutory language of three additional sections of the Speedy Trial Act to support its conclusion that the defense preparation period guaranteed by 3161(c)(2) does not apply to superseding indictments. Those sections are: (1) 18 U.S.C. §3161(d)(1) which provides for restarting the speedy trial clock fol-

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[30] A defendant could also decide to change counsel for a superseding indictment or in fact elect to proceed *pro se* and technically overcome Petitioner's objection. Such manipulation should not be encouraged by this Court where a simple recognition of the need for a minimum mandatory preparation period following the filing of each indictment would cure the problem.

lowing a successful *motion by the defendant* to dismiss an indictment or information (or dismissal of a complaint presumably by either party) where the government later files "the same offense or an offense based on the same conduct or arising from the same criminal episode"; (2) 18 U.S.C. §3161(h)(6) which provides for the exclusion of time between the government's dismissal of an indictment or information and its later filing of "the same offense, or any offense required to be joined with that offense"; and (3) 18 U.S.C. §3161(h)(8)(B)(iv) which sets forth as factors that the court shall consider in deciding to grant an "ends of justice" exclusion whether the failure to grant a continuance in a noncomplex case would deny the defendant reasonable time to obtain counsel, the defendant or the government continuity of counsel, or the defendant or the government reasonable trial preparation time.[31]

Petitioner's "bottom line" is that once a thirty-day period of time pursuant to 3161(c)(2) has run as to a defendant, regardless of when and for what reason a superseding indictment is filed, the defendant must rely upon an (h)(8)(B)(iv) discretionary continuance for trial preparation.[32] This position is grounded in Petitioner's

[31] The full text of these provisions is found in Pet. Br. at 1a-5a.

[32] Petitioner even suggests that should a superseding indictment contain wholly new charges, and not just a modification of earlier charges, the 3161(c)(2) time still would not run anew [Pet. Br. at 26]. This position would lead to more absurd results than Petitioner suggests would occur if the court of appeals decision is sustained. It would allow the government to file a single count indictment, provide mountainous discovery (so it could be said the defendant was aware) and then supersede, adding several counts of varying levels of intensity. The defendant would then be compelled to request a discretionary continuance which may or may not be granted by a federal court concerned about its calendar and moving the cases along. This is precisely the abuse 3161(c)(2) was enacted to prevent.

Further, there is no statutory or case authority to sustain the government's assertion that where completely new charges are filed in a superseding indictment, e.g., those that are not "the same offense or any offense required to be joined with that offense," the "clock" runs from the original indictment. *E.g.*, *United States* v. *Feldman*, 761 F.2d 380, 389 (7th Cir. 1985).

interpretation of the interaction of 3161(d)(1) and (h)(6) with 3161(c)(1). However, the language, history and purose of 3161(c)(2) mandate that the defense preparation period automatically applies to all superseding indictments regardless of whether the indictments overlap.

First, neither 3161(d)(1) nor (h)(6) apply to the facts of the case before this Court. Neither of these two sections address the speedy trial clock as it applies to a second indictment filed while the first indictment is pending and viable. The first indictment filed against Mr. Rojas was in existence at the time the second (superseding) indictment was filed and remained valid and viable until dismissed following the sentencing of Mr. Rojas on May 23, 1983 [DKT. 16]. On that basis neither the clock starting provisions of 3161(d)(1) (filing of a charge after a successful defense motion to dismiss) nor the excludable time provisions of 3161(h)(6) (filing a charge after dismissal by the government) control. *United States* v. *Feldman*, 761 F.2d 380 (7th Cir. 1985). The plain words of the statute given, as Petitioner would say, "their ordinary . . . common meaning, *Perrin* v. *United States*" [Pet. Br. at 13] compel the conclusion that neither 3161(d)(1) nor 3161(h)(6) controls in Respondent's case. It must be "generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion [of particular language]." *Russello* v. *United States*, 464 U.S. 16 (1983) (quoting

United States v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

Second, where indictments overlap, a simple application of 3161(c)(1) and (c)(2) requires that the speedy trial clock start as to a second or subsequent indictment when it is filed or the defendant appears, whichever is later. Section 3161(c)(1) is clear and unambiguous:

> In *any* case in which a plea of not guilty is entered, the trial of a defendant charged in *an* information or indictment . . . shall commence within seventy days of the filing date (and making public) of the . . . indictment, or . . . date the defendant has appeared [in the court where the charge is pending, whichever is later]. . . . (Emphasis added.)

Application of this rule avoids Petitioner's primary concern that the seventy-day limit would be at risk should the defendant be given the minimum defense preparation period on a second or subsequent indictment.[33] It is also consistent with the plain statutory language of 3161(c)(2). It is a simple and bright line rule easily applied by the courts and avoids substantial litigation and the constant possibilities of retrial upon reversal. *See, e.g., United States* v. *Guzman*, 754 F.2d 482 (2d Cir.), *petition for cert. filed*, 53 U.S.L.W. 3759 (U.S. Apr. 9, 1985) (No. 84-1604) (conviction wherein fifteen-year penalty imposed

[33] This rule is also consistent with the Judicial Conference Guidelines relied upon by Petitioner [Pet. Br. at 16]. *See* Comm. on the Admin. of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, as amended* (rev. 1979 with amendments through Aug. 1981 and Apr. 1983) 14, and (rev. 1979 with amendments through Oct. 1984) 15-16. These guidelines conclude that the 3161(c)(2) period does not run again on a superseding indictment where the seventy-day limit is determined from the original indictment. This rule would restart the seventy-day time period.

reversed because reasonable continuance should have been granted); see also *supra* pp. 19-21. Finally, this rule avoids placing the burden upon the defendant to justify a continuance, a circumstance that Congress, by enacting 3161(c)(2), found did not adequately insure preparation time.

Third, balancing the public's and the defendant's interests in a speedy trial against the defendant's assertion of the miniscule statutorily mandated thirty-day preparation period cannot reasonably tip the scales away from the defendant. It is the government that chooses to file second and subsequent indictments and it is the government that chooses to file those second and subsequent indictments within thirty days of trial. It is the government then that should be held responsible for dissipating the pressure on its client's right to a speedy trial by its initial poor drafting and delay in filing superseding charges. The actions of the government should not be allowed to arbitrarily and completely control the time defense counsel has to prepare. Congress recognized that courts did not always provide adequate defense preparation time so it guaranteed a minimum mandatory time for defendants to prepare to meet the charges brought (not the charges that *could* be brought). Congress also recognized that because the government controls the "switch on the clock" the defendant shoulders "an unintended and unwarranted share of the speedy trial burden." Sen. Report 212, *supra* note 19, at 26. As a result, corrective procedures including 3161(c)(2) as well as flexibility in the automatic exclusions were enacted. To now give the government control over the switch on the defense preparation clock would violate the letter and spirit of the 1979 amendments.

There is potential for abuse in a rule which "restarts" the clock but no greater than the potential for abuse

resulting from the present exclusion provisions of the Act. *See infra* note 37. In addition, it cannot be presumed that a defendant would invoke the thirty-day preparation period in every instance. Likewise, if the government continually files a subsequent or superseding indictment upon the approach of the end of the Speedy Trial Act time to trial period, it will ultimately face a valid motion to dismiss under Fed. R. Crim. P. 48(b) for unnecessary delay in bringing a defendant to trial.[34] The slight potential for abuse cannot be said to outweigh the benefits of the clock starting upon the filing of each indictment. Petitioner acknowledges that a defendant has much to do upon the filing of an indictment, e.g., retain counsel, make a plea decision, evaluate defenses, locate witnesses, file motions and confer on trial strategy [Pet. Br. at 31]. As discussed *supra* pp. 22-25, all of these actions must be repeated upon the filing of a superseding indictment assuming that any change, even a "typo," is involved. The defendant may even legitimately need or want new counsel or elect to proceed *pro se* and certainly must evaluate the impact of any change on the defense and trial strategy. Additional motions may be warranted. If all of the defense preparation is complete and is unchanged by the superseding indictment the defendant will likely consent to an earlier trial. But to place the decision in the hands of the

[34] Rule 48(b) [Dismissal] By Court: "If there is unnecessary delay in . . . bringing a defendant to trial, the court may dismiss the indictment, information or complaint." The proposition that the government may continue to dismiss and refile assumes both bad faith and that there will be no problem with 3161(b) which requires *any* indictment to be filed within thirty days of arrest or service of summons, unless extended where there was no grand jury in session or by 3161(h)(8)(B)(iii). Such an assumption should not be made and the government should be aware that a tardy (re)filing could preclude filing at all. *See infra* p. 35 and note 40.

prosecution is unfair, unwise, and does not comport with the rudimentary demands of due process.

On the strength of two circuit court decisions Petitioner concludes that where there is *no gap* between dismissal and reindictment (which also is not the precise situation here because the first indictment remained viable until after sentencing) the seventy-day clock is computed by reference to the first or "original" indictment [Pet. Br. at 15-16 n.9].[35] *A fortiori* according to Petitioner, the thirty-day minimum defense preparation period cannot run anew because it could result in a violation of the seventy-day Speedy Trial Act time to trial requirement.[36]

The cases relied upon are not persuasive authority. In *United States* v. *Rush*, 738 F.2d 497, 511 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 1355 (1985), the court recognized that the case was not governed by 3161(d)(1) or (h)(6) because the indictments overlapped but found it "fully consistent with the congressional purpose of (c)(2) to apply the thirty-day limit on the same basis as the seventy-day limit in (c)(1) *unless in a specific case this would deprive a defendant of adequate opportunity to prepare his defense*" (emphasis added). While the court found that 3161(c)(2) did not apply to the superseding indictment the decision rested upon the caveat underlined above. It must also be understood that the superseding indictment in

[35] Petitioner cites also to *United States* v. *Dennis*, 625 F.2d 782, 793 (8th Cir. 1980), as analogous support for this proposition. *Dennis* did not involve an interpretation of either 3161(d) or (h)(6) but merely recognized that there are differences in the Speedy Trial Act depending upon which party gains the dismissal.

[36] Petitioner cites as an example that a superseding indictment returned after the fortieth day, as occurred in this case, would compel a violation of the seventy-day limitation should the defendant refuse to consent in writing to a trial in less than thirty days.

Rush was returned some 671 days[37] before trial began with the formal arraignment delayed at the appellants' request to save the effort and expense of superfluous pretrial appearances by counsel. *Id.* at 511. Thus, the defendants received far more than the thirty-day minimum defense preparation time after filing of the superseding indictment.

Likewise the analysis in *United States* v. *Horton*, 676 F.2d 1165 (7th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983), is inapposite because there the government dismissed the original indictment and thus 3161(h)(6) applied. The *Horton* court recognized that overlapping indictments were not controlled by 3161(d)(1) or 3161(h)(6) but found that "a fair implication of the statute" allowed reindictment for the same offense with the clock running from the first indictment. *Id.* at 1170. The decision was based upon a district court decision that did not even address the issue and which was decided before 3161(c)(2) was enacted.[38] The Seventh Circuit has itself

[37] The "seventy-day" indictment or arraignment to trial mandate may be an illusion. *See, e.g., United States* v. *Pringle*, 751 F.2d 419 (1st Cir. 1984) (463 calendar days to trial with only 62 nonexcludable days); *United States* v. *Henderson*, 746 F.2d 619 (9th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3826 (U.S. May 6, 1985) (No. 84-1744) (789 calendar days to trial with only 66 nonexcudable days); *United States* v. *Campbell*, 706 F.2d 1138 (11th Cir. 1983) (265 calendar days to trial with only 37 nonexcludable days); *United States* v. *Clifford*, 664 F.2d 1090 (8th Cir. 1981) (211 calendar days to trial with only 62 nonexcludable days).

[38] The *Horton* court cited *United States* v. *Sebastian*, 428 F. Supp. 967, 973 (W.D.N.Y.), *aff'd on other grounds*, 562 F.2d 211 (2d Cir. 1977), as authority for its ruling. However, *Sebastian* interpreted 3161(h)(6) as permitting reindictment but did not involve or resolve the question of overlapping indictments. Furthermore, *Sebastian* was decided in 1977, two years before 3161(c)(2) was enacted. *Sebastian* did recognize a potential problem posed by 3161(b) in the reindictment of a case but found the section not applicable because the case had been indicted before the effective date of the time limits.

rejected the interpretation given *Horton* in Petitioner's brief. *United States* v. *Feldman*, 761 F.2d 380 (7th Cir. 1985). In *Feldman* the court noted that 3161(h)(6) explicitly requires the government to move for and obtain the dismissal and stated "[w]e are reluctant to expand a statutory scheme's exception, section 3161(h)(6), to include an implied dismissal by the government." *Id.* at 389.

3161(c)(2) Also Applies to a Superseding Indictment Filed After the Original Indictment has been Dismissed

Both subsections 3161(d)(1) and 3161(h)(6) have been in the Speedy Trial Act since it became law in 1975.[39] Subsection 3161(d)(1) lifts the bar to refiling of charges after a successful defense motion to dismiss. Were it otherwise, 3161(b) could and, read literally, does preclude the later (after thirty days of arrest) filing of an indictment.[40] *See United States* v. *Pollock*, 726 F.2d 1456 (9th Cir. 1984). *But see United States* v. *Heldt*, 745 F.2d 1275 (9th Cir.

[39] Provisions covering the same area were in fact contained in various Speedy Trial Act proposals dating back to 1971. *See* S. 754 (1974), H.R. 7873 (1973), H.R. 207 (1973), H.R. 658 (1973), H.R. 687 (1973), H.R. 773 (1973), H.R. 4807 (1973), *reprinted in Speedy Trial Act of 1974: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974); S. 895 (1971), H.R. 7107 (1971), S. 754 (1972 and 1974), H.R. 17409 (1974), *reprinted in* Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974* 279-374 (Federal Judicial Center 1980).

[40] 18 U.S.C. § 3161(b) requires that "*any* indictment . . . be filed within thirty days . . . of arrest [] or [service] with a summons in connection with such charges . . ." (emphasis added).

1948); *United States* v. *McCown*, 711 F.2d 1441 (9th Cir. 1983); *United States* v. *Wilks*, 629 F.2d 669 (10th Cir. 1980). However, it would be logically inconsistent to deny the government the opportunity to file a subsequent indictment solely because the defendant waited thirty days to bring a successful motion to dismiss. On that basis it is understandable why Congress specifically included the clock restarting provisions in 3161(d)(1).

Subsection 3161(h)(6) on the other hand is not a clock starting provision like 3161(d)(1) but an excludable time provision. It was evidently designed to prohibit the government from filing, dismissing and refiling simply to gain more Speedy Trial Act time.[41]

Both of these subsections remained intact during the 1979 amendments. In fact, both subsections were ignored and not discussed by either the House or Senate in 1979. The defense preparation period of 3161(c)(2) was added without regard to the previously existing sections of the Act. Section 3161(h)(6) was designed to restrict government conduct and was not intended to restrict the mandatory defense preparation period contained in 3161(c)(2). This is so particularly in view of the fact that the (h)(6) switch is controlled by the government. To hold otherwise would emasculate the intent of 3161(c)(2) to provide for a thirty-day delay of trial *in any circumstances*. *Cf. United States* v. *Wooten*, 688 F.2d 941 (4th Cir. 1982).

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[41] *See* Frase, *The Speedy Trial Act of 1974*, 43 U. Chi. L. Rev. 667, 669 (1976) ("Since the filing of superseding charges is entirely within the control of the government, such a rule makes sense: the government should not be permitted to obtain additional time simply by filing slightly different charges against the same defendant for the same criminal episode."); *United States* v. *Hencye*, 505 F. Supp. 968, 971 (N.D. Fla. 1981).

Petitioner argues that a defendant's trial preparation time in these nonoverlapping indictment situations comes from 3161(h)(8)(B)(iv). However, an equally reasonable reading of the combined effect of 3161(c)(2) and (h)(6) in such situations is to require the government, not the defendant, to justify an "ends of justice" continuance under 3161(h)(8) to avoid a violation of the seventy-day requirement. This reading gives full force and effect to the purpose of both provisions and places the burden where it belongs—on the party who controls the filing of indictments. There is no reason why it would be unfair to place the burden of obtaining excludable time on the government. Certainly if good cause exists the government can justify the delayed filing of a superseding indictment.[42]

If the government uses a superseding indictment to add defendants, a "reasonable period" of time will be automatically excluded under 3161(h)(7) (joinder of defendants). If the government intends to proceed as to the original defendants first, a superseding indictment is not necessary and the "new" defendants (whether newly discovered or not) can be charged in a separate indictment. If a superseding indictment merely "conforms the indictment more precisely or in greater detail to the contents of the bill of particulars . . . [or is reflective of] pre-trial

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[42] For Petitioner to admit that the government uses the grand jury to correct typographical errors, eliminate charges or delete defendants is astounding. Certainly grand juries have more to do than pass judgment on the same case twice solely because indictments cannot be proofread and unnecessary charges or co-defendants dismissed out before trial. The government can seek an extension of the thirty-day arrest to indictment time period should it need more time to return a solid, well drafted indictment. 18 U.S.C. § 3161(h)(8)(B)(iii). Additionally, how quickly the government forgets it makes the decision of when and who to indict and for what offenses.

motions," [Pet. Br. at 33] the government should be able to supersede with more than thirty nonexcludable days left before trial, and if not, obtain a 3161(h)(8) exclusion in order to so file.

Rather than viewing the reconciliation of 3161(h)(6) and 3161(c)(2) as another burden to be carried by the defendant because "a new indictment does not always require significant additional preparation . . . strategy may be totally unaltered . . . the defendant [received] sufficient informal notice" [Pet. Br. at 33], it should appropriately be placed with the party creating the problem—the government. Additionally, had Congress intended 3161(h)(8)(B)(iv) to supplant (c)(2) as the defense preparation period it would not have needed to enact both subsections. Both 3161(h)(8)(B)(iv) and (c)(2) were products of the 1979 amendments designed to remedy separate problems: "[w]hy would the drafters add a second provision to protect a right already explicitly provided?" *Cuyler* v. *Adams*, 449 U.S. 433, 446 (1981). As this Court aptly noted, common sense requires that a second paragraph be construed as securing something more.[43] *Id.* at 446.

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[43] The Senate Judiciary Committee also recognized the distinction between the 3161(c)(2) right and the 3161(h)(8) "ends of justice" continuance provision. It suggested that the courts scrutinize counsel's "good faith" efforts to prepare within the time set for trial "[i]f, for example, counsel for the defendant moves for an 'ends of justice' continuance under section 3161(h)(8) to allow him or her *additional time* to prepare for trial . . ." (emphasis added). Sen. Report 212, *supra* note 19, at 32. This language reflects the distinction between the trial preparation time provided in 3161(c)(2) and the "ends of justice" preparation time provided for in 3161(h)(8). *See also* 1979 House Hearings, *supra* note 15, at 12 (testimony of Robert Fiske recognizing that two provisions in the amendments provide for preparation time and continuity of counsel).

A second reasonable interpretation of the combined effect of 3161(c)(2) and (h)(6) is to find that the assertion of the (c)(2) right where a superseding indictment is filed within thirty days of the seventy-day time limit automatically invokes an (h)(8)(B)(iv) exclusion and allows the court to reschedule a trial date past what would have been the original seventy-day limit. This interpretation also gives full force and effect to the purpose of both provisions. As reflected earlier in note 37, the seventy-day limit is often an illusion in view of the many exclusions available in the Speedy Trial Act. Petitioner's concern that the (c)(2) minimum defense preparation period will cause a violation of the seventy-day limit of (c)(1) does not recognize the realities of the Speedy Trial Act.

Given that there are interpretations of 3161(h)(6) consistent with invoking the mandatory provisions of 3161(c)(2), this Court should "err" on the side of a statutory construction supporting fundamental constitutional rights. *Cf. Time, Inc.*, v. *Regan*, 468 U.S. ____, 104 S. Ct. 3262, 3292 (1984) (Stevens, J., concurring in part and dissenting in part). Congress granted the defendant a minimum mandatory preparation period (3161(c)(2)) as well as the ability to seek a longer preparation time (3161(h)(8)(B)(iv)) where necessary. The minimum mandatory preparation time was designed to start when the defendant was in a position to defend himself. Sen. Report 212, *supra* note 19, at 32. To construe the statute to take away the minimum preparation time upon the unilateral action of the government in filing a subsequent indictment is not consistent with the Sixth Amendment.

Adoption of Petitioner's position that the defendant in a federal criminal case can be compelled to trial in less than thirty days of the date the government chooses to file a superseding indictment will completely destroy the pur-

pose of the defense preparation period mandated by Congress in 18 U.S.C. §3161(c)(2). Petitioner's position subjects the rights of the criminal defendant to the will and whims of the prosecution. It is contrary to the intent and language of the statute and poses severe practical burdens on the criminal defendant which should not be countenanced by this Court.

II.

FORCING A DEFENDANT TO GO TO TRIAL IN VIOLATION OF 18 U.S.C. §3161(c)(2) CAN NEVER BE DEEMED HARMLESS ERROR.

Under the guise of the harmless error doctrine, Petitioner reargues its position that 18 U.S.C. §3161(c)(2) does not and should not allow a defendant to assert the minimum mandatory thirty-day preparation period following the filing of a superseding indictment. According to Petitioner this is so, particularly in Respondent's case, because one thirty-day period has already been granted and used and there can be no conceivable basis to claim that the superseding indictment impeded trial preparation.

Again, Petitioner completely ignores the language, purpose and history of 18 U.S.C. §3161(c)(2). *See supra* pp. 14-27. In enacting the Speedy Trial Act, Congress created a rigid statutory scheme and, as Petitioner writes, constructed "a window of time during which a case must be tried" [Pet. Br. at 8]. Petitioner now asks this Court to ignore the specific mandate of the Speedy Trial Act and find a violation of the Act to constitute harmless error. To do so would write 3161(c)(2) out of the Speedy Trial Act and render it a nullity.[44]

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[44] Petitioner suggests [Pet. Br. at 42] that none of the defense attorneys who testified at the 1979 House and Senate hearings suggested that harmless error principles would not apply. It is equally notable that no one suggested that harmless error principles would apply. The issue was simply never discussed. The Second Circuit Guidelines do not support a harmless error test because they did not create or even suggest a bright line rule like section 3161(c)(2).

The harmless error rule is found in both Rule 52 of the Federal Rules of Criminal Procedure and 28 U.S.C. §2111. This Court has construed the rule to apply to constitutional errors, *Chapman* v. *California*, 386 U.S. 18 (1967); *United States* v. *Hasting*, 461 U.S. 499 (1983), as well as non-constitutional errors. *See Hamling* v. *United States*, 418 U.S. 87, 108 (1974) and cases cited therein; *see also Kotteakos* v. *United States*, 328 U.S. 750 (1946). However, application of the harmless error rule is not carved in stone for this Court has recognized that there are exceptions to the rule and certain errors that may involve rights so basic to a fair trial that their violation can never be harmless. *United States* v. *Hasting*, 461 U.S. at 508 n.6 (citing *Payne* v. *Arkansas*, 356 U.S. 560 (1958) (coerced confession); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (right to counsel); and *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (impartial judge)); *Jackson* v. *Virginia*, 443 U.S. 307, 320 n.14 (1979) ("[o]ur cases have indicated that failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error"). There may also be some errors that call for automatic reversal because the impact of the error is impossible to determine. *E.g.*, *Connecticut* v. *Johnson*, 460 U.S. 73 (1983) (plurality opinion) (because the impact of a jury instruction given in violation of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), could not be determined the error could not be deemed harmless); *Carpenters* v. *United States*, 330 U.S. 395, 408 (1947) (jury instruction that misstated the law could not be harmless error even

though there was evidence of guilt because "[t]here [was] no way of knowing [] whether the jury's verdict was based on facts within the condemned instructions. . . . A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction."); *Bollenbach* v. *United States*, 326 U.S. 607, 617 (1946) (erroneous instruction not harmless even in view of abundant evidence since "[i]t would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide. . . . [t]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."); R. Traynor, *The Riddle of Harmless Error* 57, 64-73 (1970).

Likewise, violations of standards prescribed by Congress, regardless of how clear the evidence in a case, fall within this category of error subject to automatic reversal. In *Carpenters* v. *United States*, this Court clarified the deference which rules of Congress are to be accorded holding

> [o]ur only point is this: Congress in §6 [of the Norris-LaGuardia Act] has specified the standards by which liability . . . is to be determined. No matter how clear the evidence, [the defendants] are entitled to have the jury instructed in accordance with the standards which Congress has prescribed. . . . It could not be said that the failure [to instruct properly] was harmless error.

Id. at 410. Implementation of the strict rule of 3161(c)(2) must be accorded this same deference. It is a rigid standard prescribed by Congress and a matter directly affecting the judicial process and the administration of justice. The harm that results from its violation must be presumed for it cannot be measured or evaluated. A violation

of 3161(c)(2) resulting from forcing the defendant to go to trial on a superseding indictment in less than the minimum preparation period must therefore be subject to automatic reversal.

The selection of thirty days as a minimum defense preparation period appears from all accounts to be an arbitrary time period suggested by both the Judicial Conference and the Department of Justice.[45] *See supra* note 15. Congress adopted the recommended thirty-day requirement and gave the defendant the option to proceed to trial in less than thirty days by consenting to such in writing. Implicitly, Congress found that forcing a defendant to trial in less than thirty days would be harmful to the defendant and prejudicial error. It adopted 3161(c)(2) to prevent the Speedy Trial Act from becoming the "Speedy Conviction Act," Sen. Report 212, *supra* note 19, at 26, and to express the policy that a defendant must be accorded some minimal preparation time even in the simplest case. *See supra* text at note 18. The mandatory defense preparation period was inserted into the Act due to a serious concern that defendants would be rushed to trial because of countervailing Speedy Trial Act demands. *Supra* note 24; 1979 Senate Hearings, *supra* note 15, at 93, 115. Thus, 3161(c)(2) was enacted in order to guarantee defendants a minimum of thirty days to prepare for trial.

Congress also provided for a discretionary "ends of justice" continuance pursuant to 3161(h)(8)(B)(iv) which

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[45] There has been a more recent suggestion that thirty days is too short. *Implementation of the Speedy Trial Act, Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 64 (1981) (statement of Robert Weinberg, Williams and Conley, recommending a 120-day minimum defense preparation period).

the court can use to grant relief from too speedy a trial in order for counsel to be prepared. Presumably, a denial of a discretionary continuance pursuant to 3161(h)(8)(B)(iv) would be subject to Petitioner's harmless error analysis unless the Sixth Amendment was violated. *Cf. United States* v. *Burton*, 584 F.2d 485, 491 n.19 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979) (harmless error tests do not apply to Sixth Amendment violation based on denial of continuance where it would have been fair and reasonable to enable the defendant to retain or substitute counsel). However, to allow a violation of a specific and non-discretionary thirty-day provision to go uncorrected by virtue of finding the violation harmless error would be equivalent to repealing the law itself. Quite obviously, this Court interprets the law and is not a legislative body. *Marbury* v. *Madison*, 1 Cranch 137 (1803); *Barker* v. *Wingo*, 407 U.S. 514, 523 (1972).

If trial on day twenty-nine instead of day thirty-one can be deemed harmless error, 3161(c)(2) has no meaning. Either Congress created an inflexible rule or it did not. Indeed, in *Barker* v. *Wingo*, a decision rendered prior to the Speedy Trial Act, the Sixth Amendment's Speedy Trial Clause was given an extremely flexible interpretation. In that case, this Court refused to create a specified time limit for trials finding that to do so would require the Court to engage in legislative activity. It was in response to this decision and to the lack of guidance supplied by Fed. R. Crim. P. 50(b)[46] that Congress enacted the inflexible rules of the Speedy Trial Act.[47]

[46] Then existing Fed. R. Crim. P. 50(b) provided in pertinent part:

> To minimize undue delay and to further the prompt disposition of criminal cases each district court shall . . . prepare a plan for the prompt disposition of criminal cases which shall include rules relating to time limits within which procedures prior to trial, the trial itself . . . must take place. . . .

Certainly the words in 3161(c)(2) that "unless the defendant consents in writing to the contrary, the trial *shall not commence less than thirty days* . . ." (emphasis added) are inflexible and create a bright line standard. The statute does not say "if it does not prejudice the defendant, trial shall not commence" but instead commands that unless the defendant acts to waive the minimum mandatory defense preparation period of thirty days, "*trial shall not commence less than thirty days*. . . ."

In view of the explicit language of 3161(c)(2) there was no reason for Congress to expressly provide a remedy for its violation. Courts must follow its mandate or face retrial of the cause. There can be no other remedy.[48] Remedies for violations of the outer time limits (thirty days plus exclusions from arrest to indictment pursuant to 3161(b) and seventy days plus exclusions from indictment to trial pursuant to 3161(c)) were required because the courts would not be in complete control of those limits. The government is in primary control of the outer time

[47] *See* Legislative History, Pub. L. No. 93-619, 1974 U.S. Code Cong. & Ad. News 7401, 7404-05.

[48] The Ninth Circuit recognized that Congress did not amend 18 U.S.C. § 3162(a)(2) to conform to the addition of 3161(c)(2) and found that "it is an open question" whether the sanction of dismissal set forth in 3162(a)(2) applies to violations of 3161(c)(2). *United States* v. *Daly*, 716 F.2d 1499, 1506 (9th Cir. 1983). However, because the defendant in *Daly* did not move for dismissal as required by 3162(a)(2) the court did not reach that question. Instead, it found that the violation of 3161(c)(2) was equivalent to forcing the defendant to trial without adequate preparation time and remanded for a new trial. *Id.* at 1506.

limits by virtue of its management of the time of the grand jury as well as its decision making authority over the number and magnitude of the cases presented. If the government cannot be prepared to try its case within the statutorily mandated time provisions of the Speedy Trial Act then Congress requires that sanctions be imposed. Thus, Congress has given specific guidance to the courts as to what to do in the event that the parties do not comply with the outer time limits of the Act. 18 U.S.C. §3162. These sanction provisions are necessary for the court to punish actions outside of its immediate control. However, the scheduling of a trial date beyond a minimum time period is completely within the control of the court. There is no reason for a court to violate the rule and therefore no reason for Congress to have specified a sanction. For those courts that choose to ignore the mandate of Congress to provide a thirty-day minimum defense preparation period, there can be no remedy other than retrial with the appropriate preparation period provided. Petitioner's statement that there is no evidence that Congress intended an otherwise valid conviction to be overturned simply because its rules were violated [Pet. Br. at 41] is misleading. There is no evidence that Congress expected its rigid rule would be violated because there was no reason to believe a matter completely within the control of the court would be ignored by the court. Congress is entitled to expect its standards will be followed. *Carpenters* v. *United States*, 330 U.S. at 410. The rule Congress created in 3161(c)(2) does not require the exercise of any discretion.

In providing for the strict requirement that a "trial *shall not commence*" Congress essentially created an exception to the concept of harmless error. Congress did not need to specifically state an exemption from that

concept because by making a rigid date requirement it created one. Rarely if ever could a defendant show specific prejudice resulting directly from the court starting trial one day in advance of the expiration of the minimum defense preparation period. However, had Congress intended the courts to make discretionary calls with regard to the defense preparation period it could have adopted the language of the Second Circuit Guidelines or provided that 3161(h)(8)(B)(iv) be the sole basis for providing time to prepare for trial. It did not. *See supra* pp. 16-18, 38. This Court cannot now adopt a new flexibility that the Congress did not. A case by case analysis of the "possible injury" [Pet. Br. at 45] or harm caused by forcing a defendant to go to trial in less than the thirty-day minimum defense preparation period cannot be permitted.[49] To do so will encourage violations of the rigid rule created by Congress in 3161(c)(2) and will subrogate the plain meaning of the rule and the intent of Congress to the calendar of the district courts and prosecutors.

There can be no other reasonable result than the one adopted by the court of appeals and that is to reverse any conviction obtained after a defendant has been forced to trial in violation of 3161(c)(2) and to allow for a new trial. *Per se* application renders 3161(c)(2) clear and meaningful. That clarity and meaning will be destroyed by upholding, under the guise of harmless error, a district court's decision to force a defendant to trial in violation of the minimum mandatory defense preparation period.

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[49] Respondent does not in any manner concede, or agree with Petitioner, that the superseding indictment did not increase his burden, open up new lines of defenses, or affect his ability to be ready for trial. To the contrary, Respondent has set forth the "possible injury" caused by the violation of 3161(c)(2). *Supra* pp. 23-25.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submittted,

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Appointed by this Court

APPENDIX

APPENDIX

United States District Court

FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

v.

FERNANDO ROJAS-CONTRERAS
A23 103 064

COMPLAINT for VIOLATION of
U.S.C. Title 8 Section 1325 (Felony)
U.S.C. Title 8 Section 1326 (Felony)

FILED FEB 14, 1983
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BEFORE: J. EDWARD HARRIS
SAN DIEGO, CALIFORNIA

The undersigned complainant being duly sworn states:

COUNT ONE

That on or about May 15, 1982, defendant Fernando ROJAS-Contreras was arrested and deported from the United States to Mexico through the Port of Calexico, California, in pursuance of law, and thereafter, on or about February 13, 1983, defendant was found in San Diego County, within the Southern District of California, the Attorney General of the United

States not theretofore having consented to any reapplication by the defendant for admission into the United States and after the defendant has willfully and unlawfully returned and remained in the United States, in violation of Title 8, United States Code, Section 1326.

COUNT TWO

That on or about February 13, 1983, within the Southern District of California, defendant Fernando ROJAS-Contreras, an alien, did knowingly and willfully enter the United States at a time and place other than as designated by Immigration officers and elude examination or inspection by Immigration officers, a felony, in violation of Title 8, United States Code, Section 1325, in that the defendant was previously convicted for violation of Title 8, United States Code, Section 1325, on March 1, 1981.

And the complainant states that this complaint is based on statements of the apprehending officers that the defendant was found near Chula Vista, California, and upon inquiry was unable to establish United States citizenship, has no identification on his person, was unable to speak English, and admitted to apprehending officers that he was a citizen of Mexico and had no right to be in or enter the United States.

JAMES P. WAGONER
Border Patrol Agent

February 14, 1983